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IN THE

Supreme Court of the United States

October term, 1965

No. 136

FRANTZESKOS PAVGOUZAS, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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OPINION BELOW

The opinion of the Court of Appeals is reported at 341 F. 2d 920. The opinion of the Court of Appeals appears as Appendix A at page 15, infra. The opinion of the Board of Immigration Appeals appears as Appendix B at page 16, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1965. ~~On April 30, 1965, the time within which to file a petition for a writ of certiorari was extended to May 13, 1965. The petition to extend the time was filed April 16, 1965 and was granted April 30, 1965.~~ The jurisdiction of this Court rests on ~~the Act of June 27, 1952, Ch. 477, title II, Ch. 5, § 244, 66 Stat. 28~~ 8 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 244 (f) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 USC 1254, added by the Act of October 24, 1962, Pub. L. 87-885, 76 Stat. 1247; 8 U.S.C. 1254(f), divests an alien of discretionary relief previously granted him in the form of voluntary departure and pre-examination, and divests him also of the right to file an application for suspension of deportation, a remedy available to him under the Act of 1952.

2. Whether the decision of the Court below, denying the right to file an application for suspension of deportation because of the retroactive nature of the 1962 amendatory statute runs counter to the rules of statutory construction in that the amendatory statute is neither curative nor does it legalize a prior disadvantaged position.

3. Whether the fact that no savings clause was contained in the amendatory act of 1962, deprives the petitioner of the privilege of filing an application for suspension of deportation granted to an alien under the basic 1952 Act.

STATUTES INVOLVED

Immigration and Nationality Act of June 27, 1952, ch. 477, title II, ch. 5, § 244, 66 Stat. 214, 8 U.S.C. § 1254.

"§ 1254. Suspension of deportation.

"(a) Adjustment of status for permanent residence; contents.

"As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * * * *

"(3) last entered the United States within two years prior to, or at any time after June 27, 1952; is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

* * * * *

"(f) [added Oct. 24, 1962, Pub. L. 87-885, § 4, 76 Stat. 1247.] Application of provisions to alien crewmen; students, scholars, etc.; and natives of contiguous country or adjacent island.

"No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; or (2) was admitted to the United States pursuant to section 1101(a)(5)(J) of this title or has acquired such status after admission to the United States; or (3) is a native of any country contiguous to the United States or of any adjacent island named in section 1101(b)(5) of this title: *Provided*, That the Attorney General may in his discretion agree to

the granting of suspension of deportation to an alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa."

STATEMENT OF THE CASE

This case involved the action of the Court below in affirming a decision of the Board of Immigration Appeals which denied Petitioner's motion to re-open the proceedings to afford him an opportunity to apply for suspension of deportation.

The respondent defends on the ground that the Act of October 24, 1962, Pub. L. 87-885, section 4, 76 Stat. 1247, amending the basic Immigration and Nationality Act of 1952, makes an alien who entered the United States as a crewman, ineligible for suspension of deportation.

Petitioner entered the United States on May 4, 1954, as a crewman. Deportation proceedings were commenced against him on September 13, 1955, and, after hearing, the Special Inquiry Officer ordered that Petitioner be deported. Petitioner's appeal from the decision of the Special Inquiry Officer was dismissed by the Board of Immigration Appeals. A petition for declaratory judgment and review was filed with the United States District Court, which granted a temporary restraining order. Petitioner was married to an American citizen on January 19, 1957. A petition for the issuance of a nonquota visa was filed on February 21, 1957, which was approved and granted. On July 2, 1957, the United States District Court granted the Government's motion for summary judgment. The immigration proceedings were subsequently reopened, and Petitioner was granted pre-examination and voluntary departure. Petitioner filed an application for an immigrant visa to the American Consul at Montreal, Canada, on May 16, 1958, which was returned in June, 1958, because of a change in

procedure. A subsequent application was returned as being outdated. A further requirement by the American Consulate was for a police certificate which, however, was already furnished and was in compliance with the law.

Petitioner was unable to appear at the Philadelphia office of the Immigration and Naturalization Service to qualify for the exercise of the privilege of a pre-examination on June 30, 1960, because of inability to obtain public or private transportation from Wildwood, N. J., to Philadelphia. Petitioner was then granted extension of voluntary departure, the last extension being until April 30, 1964. On that date a motion was filed to reopen the proceedings in order that petitioner could apply for suspension of deportation, under the Immigration and Nationality Act of 1952.

Canada has indicated that Petitioner would be admitted as a temporary visitor, provided that the Immigration and Naturalization Service would issue an assurance to the Canadian Government that the Petitioner would be readmitted to the United States, but the Immigration and Naturalization Service has been unwilling and has refused to give such assurance or furnish a re-entry permit.

On April 30, 1964, Petitioner filed a petition to re-open the immigration proceedings with the Board of Immigration Appeals, Immigration and Naturalization Service, in order to be afforded the opportunity to apply for suspension of deportation. This motion was filed at the Immigration and Naturalization office, 128 North Broad Street, Philadelphia, and, at the same time, Petitioner made an application to the District Director of the Immigration and Naturalization Service for an extension of the privilege of voluntary departure, pending disposition of the motion to re-open proceedings before the Board of Immigration Appeals. This application for an extension of voluntary departure was denied.

Petitioner's counsel was advised by the Immigration and Naturalization Service that unless Petitioner made

arrangements for his immediate departure a deportation order would be issued and Petitioner would be apprehended and deported. On May 1, 1964, the Immigration and Naturalization Service issued a deportation order against Petitioner.

On May 8, 1964, Petitioner's motion to re-open the immigration proceedings was denied by the Special Inquiry Officer, without a hearing and without oral argument, although both were requested. An immediate appeal from this decision was taken by petition to the Board of Immigration Appeals for the following reasons:

a. The action of the Special Inquiry Officer in denying Petitioner's motion to re-open the proceedings without a hearing, without taking testimony and without oral argument was arbitrary, unreasonable and capricious.

b. Petitioner's request for the re-opening of the proceedings was within the provisions of 8 CFR 242.22 and should have been granted;

c. The answer filed by the Government admitting the averments set forth in Petitioner's motion required that the motion be granted and oral testimony be taken by the Special Inquiry Officer.

d. Petitioner is eligible for suspension of deportation under § 244 of the Immigration and Nationality Act of 1952, and his eligibility has not been affected by the Amendatory Act of October 24, 1962, Pub. L. 87-885, § 4, 76 Stat. 1247.

e. Petitioner also appealed from the denial of an extension of voluntary departure.

Because of the refusal of the Immigration and Naturalization Service to grant an administrative stay, Petitioner filed a petition for declaratory judgment and review in the United States District Court for the Eastern District of Pennsylvania, seeking a preliminary injunction to restrain the Respondent from requiring Petitioner to depart

voluntarily from the United States and from requiring Petitioner to report to the Respondent for deportation and/or from apprehending and deporting Petitioner from the United States pending the disposition of Petitioner's motion to re-open the immigration proceedings, and for other relief.

At the hearing scheduled before the Honorable Alfred L. Luongo on May 7, 1964, on the motion for preliminary injunction, the respondent agreed to grant an administrative stay pending the disposition of the appeal by the Board of Immigration Appeals.

On July 15, 1964, the Board of Immigration Appeals dismissed the motion to re-open the immigration proceedings. The action of the Special Inquiry Officer, subsequently approved, was arbitrary, unreasonable and capricious. Petitioner then filed his petition for review to the Court of Appeals for the Third Circuit.

The Court of Appeals affirmed the decision of the Board of Immigration Appeals.

SUMMARY OF ARGUMENT

Petitioner is an alien of Greek descent who has a wife, an American-born citizen, and a minor child. Two other children of the marriage died in infancy. His wife's application for a nonquota visa was approved. The application for such visa was returned by the American Consul in Montreal because he did not furnish an unobtainable Greek Police document, although the customary Greek Police Certificate was furnished. The Petitioner, while otherwise qualified, was unable to meet a departmental deadline in connection with his grant of pre-examination. The Immigration and Naturalization Service refused to furnish Petitioner with a re-entry permit, although Petitioner was granted discretionary relief and had complied with the requirements for a visa. The furnishing of this re-entry

permit would enable the Petitioner to satisfactorily convince the American Consul in Montreal that the Greek Police Certificate previously furnished met the requirements under the law.

Petitioner has the right to apply for suspension of deportation under the basic Immigration and Nationality Act of 1952. The amendatory act of 1962, which denied the privilege of discretionary relief to alien crewmen, was prospective only and is not retroactive. The amendatory act of 1962 was not curative or legalizing, an important factor in determining whether an act is to be construed as being retroactive.

The savings clause in the basic Immigration and Nationality Act of 1952 covered all Amendatory Acts and it was not necessary for a savings clause to be included in the 1962 amendment.

When the Petitioner was granted discretionary relief, he acquired rights which cannot be divested by the amendatory act of 1962.

Petitioner was not accorded procedural due process of law.

ARGUMENT

The Board of Immigration Appeals affirmed the Special Inquiry Officer's decision denying appellant's motion to reopen proceedings because the amended act of October 24, 1962, did not contain a savings clause. It is contended, however, that no savings clause was necessary in the amendatory act, since the basic Immigration and Nationality Act of 1952 did contain a savings clause. It is inconceivable that every amendment of said act would be required to contain a separate savings clause. Unless the Amending Act of October 24, 1962 could stand as a complete Act in itself, governing Immigration and Nationality procedure, it would not require any savings clause of its own. The savings clause in the original act was

sufficient to cover and protect whatever rights accrued to any alien prior to the effective date of said amendment. No authority to the contrary is cited either by the Board of Appeals, by the Government or by the Court below. The whole development of the savings clause manifests a well established congressional policy not to strip aliens of advantages gained under prior laws. *Shintaro Miyagi v. Brownell*, 227 F. 2d 33.

In support of Petitioner's contention, the Court's attention is respectfully called to the following cases: *U.S. v. Community T.V. Inc.*, 327 F. 2d 797 (C.A. 10, 1964); *Savage v. United States*, 220 F. Supp. 745, 751 (1963); and *Hassett v. Welch*, 303 U.S. 303 (1938).

Specifically, a statute operates prospectively only. While Congress has the legislative power to enact laws which act retroactively, "the presumption, however, is that all laws operate prospectively only and only when the Legislature has clearly indicated its intention that the law operate retroactively will the Courts so apply it. Retroactive operation will more readily be ascribed to legislation that is curative or legalizing than to legislation which may disadvantageously, although legally, affect past relations and transaction." (Sutherland, *Statutory Construction* (3rd ed.), vol. 2, p. 243, sec. 3501).

The amendatory act of October 24, 1962, is certainly not curative nor does it legalize any "legislation which may advantageously, although legally, affect past relations and transactions." Under these circumstances, the amendatory act of 1962 can only be construed as operating prospectively and not retroactively.

The Government contends that the instant case is governed by the case of *Tanfaro v. Immigration and Naturalization Service*, 331 F. 2d 851 (C.A. 3, 1964). It is respectfully submitted that the decision in that case was a per curium decision and did not specifically indicate that the basis for its decision was the ineligibility of an alien to apply for suspension of deportation under the amendatory

act of 1962. The *Tanfaro* case involved a situation where the appellant had unsuccessfully applied for suspension of deportation and then attempted to renew it. In addition thereto, he sought to avoid deportation on the ground that to return him to his native Yugoslavia would result in his prosecution on religious grounds.

The case relied upon by the Government, *Foti v. Immigration and Naturalization Service*, 332 F. 2d 424 (C.A. 2), does rule that an alien who entered the United States prior to the effective date of the amendment of 1962 was ineligible for the discretionary relief for suspension of deportation. However, the Court in that case relied upon the case of *Fassilis v. Esperdi*, 301 F. 2d 429 (C.A. 2, 1962).

The facts in the *Fassilis* case are entirely different from the instant case. In the *Fassilis* case, the agency had not acted favorably on his application for discretionary relief, but denied it. In the instant case, however, the Immigration and Naturalization Service had affirmatively acted on the petitioner's application for discretionary relief and, therefore, as the Court so well expressed it in the *Fassilis* case, "the policy or judgment" had been rendered by the agency which "alone is authorized to make." In effect, its grant of discretionary relief is like the verdict of a jury on a question of fact which was submitted to it.

The amendatory act in the *Fassilis* case was permitted to attach because "no administrative judgment" had been rendered by the Immigration and Naturalization Service. In the instant case, however, the "administrative judgment" had been favorably made in the form of pre-examination and voluntary departure. If the amendatory act of 1962 is not to be applied and is not applied retroactively, then the whole basis of the decision of the Court below falls.

As an indication that the Government did not consider that the act was being applied retroactively, the following is quoted from the brief of the Government (p. 17), filed with the Court below:

"Actually, however, the 1962 amendment is not being applied retroactively to petitioner. What the Second Circuit said in *Fassilis* with respect to the 1960 amendment there involved is equally pertinent here (301 F. 2d at pp. 432-433);

" 'In reaching this result we point out that the July 14, 1960 amendment is not being applied retroactively. While the appellant's applications were still subject to administrative adjudication, the applicants had no established right to the future status they were seeking to obtain by their application. This was especially so since the statute here involved made the granting of such applications a matter wholly within the discretion of the Service . . . Here the aliens had acquired no status prior to the amendment that they were deprived of by the amendment, for the status each of them sought the agency to award them was not acquirable until final administrative action upon their applications.' "

If the Government had continued its quotation of the Court's decision of the *Fassilis* case, the thrust of the Petitioner's argument would be even more apparent. The decision goes on to say:

"The holding in United States v. Magnolia Petroleum Co., 276 U.S. 160, 48 S. Ct. 236, 72 L. Ed. 509 (1928), cited by appellants, is not an inconsistent one. There the Commissioner allowed a taxpayer's claim for a refund with interest for taxes erroneously paid; but after the Commissioner had determined the amount of this interest and had notified the taxpayer of the amount of interest payable to it, a new Reserve Act was passed that changed the method of computing the interest. Under this new Act the Commissioner tendered a lesser sum to the taxpayer than the taxpayer was earlier informed that it would receive under the former Act. The Supreme Court held that the

Commissioner should have continued to settle the interest as it had been computed under the former Act.

"The situation there was quite different from that of the three appellants here. There the Commissioner had established that the taxpayer was entitled to relief before the amendment became law and the computation of the interest under the new amendment retroactively deprived the taxpayer of property awarded it under the old law. Here the aliens had acquired no status prior to the amendment that they were deprived of by the Amendment for the status each of them sought the agency to award them was not acquired until final administrative action upon their applications."

In the case at bar, discretionary relief had already been granted in the form of pre-examination and voluntary departure. As a result, the Petitioner had certain vested rights already established by the action of the Immigration authorities. Under the Immigration and Nationality Act of 1952, the right to file an application for suspension of deportation could be filed at any time. This right was not affected in any way by the amendatory act of 1962. The language of the amendatory act in question is:

"No provision of this Section shall be applicable to an alien who (1) entered the United States as a crewman . . ."

The fact that the word "entered" was used instead of "who shall enter" is immaterial, as there was no specific reference to the fact that this would apply to all aliens who entered prior to the effective date of the amendatory act, or that the same affected all aliens regardless of whether or not they had already been granted discretionary relief, as in the instant case.

It is an important function of an administrative agency to afford Petitioner and others seeking relief before

it due process of law. As is aptly stated by the Court in *First National Bank of Smithfield, N. C. v. First National Bank of E.N.C.*, 232 F. Supp. 725 (1964):

> "Upon application for review of agency action, it becomes 'a specialized responsibility whether the competence of the judiciary' to determine if the aggrieved party has been accorded procedural due process.
>
> ". . . any administrative burden incident to procedural due process cannot be deemed sufficient ground to deprive parties of constitutional rights."

It is incumbent upon the Special Inquiry Officer to grant Petitioner's motion to reopen the proceedings and permit him to file an application for suspension of deportation and then to hold a hearing at which all of the facts would be ascertained and on the basis of which he could render a decision.

Failure to grant the motion to reopen the proceedings and to hold such a hearing was a basic deprivation of Petitioner's rights to due process of law under the 5th Amendment of the Constitution of the United States.

The Court's attention is also respectfully called to the case of *Costello v. Immigration and Naturalization Service*, 376 U.S. 120, 11 L. Ed. 2d 559 (1964). In that case, Costello, while a naturalized citizen, was convicted of two offenses of income tax evasion. Thereafter his citizenship was revoked for willful misrepresentation. On the basis of these two convictions, he was ordered deported. The Supreme Court reversed this decision on the ground that these two convictions occurred at a time when he was a naturalized citizen. The import of this decision indicates that rights acquired during the existence of a particular legal status could not be retroactively revoked by subsequent legislation. Similarly, the right of suspension of deportation which the Petitioner had under the Act of 1952, could not be retroactively revoked by the Act of 1962.

The importance of granting this writ of certiorari rests on the fact that it will affect agency action on acquired rights of administrative relief, not only in immigration cases, which are undoubtedly numerous, but also similar action by other governmental agencies.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

J. J. KILIMNIK
GREGORY G. LAGAKOS
Counsel for Petitioner

Dated: May 13, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15012

FRANTZESKOS PAVGOUZAS,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

Argued February 16, 1965

Before KALODNER and SMITH, *Circuit Judges* and KIRKPATRICK, *District Judge*

OPINION OF THE COURT

(Filed March 2, 1965)

PER CURIAM:

On review of the record we find no error. The Order of the Board of Immigration Appeals will be affirmed.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

File: A-10323104—Philadelphia

In re: FRANTZESKOS PAVGOUZAS

IN DEPORTATION PROCEEDINGS

APPEAL

ORAL ARGUMENT: June 4, 1964

CHARGES:

Warrant: Sec. 241(a)(1), I&N Act (8 USC 1251 (a)(1))—Excludable—no immigrant visa

Lodged: None

APPLICATION: Motion to reopen for suspension of deportation

The record relates to a native and citizen of Greece, 32 years old, male, who last entered the United States at the port of Norfolk, Virginia on or about May 4, 1954, on the S/S "Caspiana" as a seaman. On March 28, 1956, the special inquiry officer found him deportable on the charge stated above and an appeal from his decision was dismissed by the Board of Immigration Appeals on August 15, 1956. Thereafter on August 22, 1957, the Board withdrew the outstanding order and warrant of deportation and directed that the case be remanded to the special inquiry officer for the purpose of considering the respondent's request for discretionary relief. On November 19, 1957, the special inquiry officer granted the respondent the privilege of voluntary departure with preexamination within such period of time and under such circumstances as the District Director should direct, and further ordered that if the respondent failed to depart when and as required, the priv-

ilege of voluntary departure with preexamination should be withdrawn without further notice or proceedings and that the respondent be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest. No appeal was taken from this order.

The motion to reopen the proceedings to afford the respondent an opportunity to apply for suspension of deportation was submitted April 30, 1964. A warrant of deportation was issued May 1, 1964.

The motion to reopen as well as the initial deportation proceedings agree that the respondent originally entered the United States on May 4, 1954 at Norfolk, Virginia on the S/S "Caspiana" as a seaman. The motion recites that the respondent was married to an American citizen on January 19, 1957 and that his wife's visa petition to accord him nonquota status was approved the following month; that his application for a preexamination and voluntary departure was granted; and that the petitioner filed an application for an immigrant visa with the American Consul at Montreal, Canada on May 16, 1958. The motion further recites additional circumstances as the result of which the respondent failed to take advantage of the voluntary departure and preexamination privilege while it was available and prays that because of special circumstances in this case the respondent is eligible for suspension of deportation.

Section 244(f) of the Immigration and Nationality Act, as amended October 24, 1962, provides that an alien who entered the United States as a crewman shall be ineligible for suspension of deportation. It has been held that this amendment precludes eligibility for suspension of deportation to crewmen, even though such crewmen entered the United States prior to such amendment.[1] Paraphrasing

[1] *Foti v. Immigration and Naturalization Service*, No. 27345 (2d Cir. May 26, 1964); *Matter of Goncalves*, Int. Dec. 1285; *Matter of Fong*, Int. Dec. 1272; *Matter of Tarabocchia*, Int. Dec. 1266.

the observation of the court in the case of *Fassilis v. Esperdy*, 301 F. 2d 429 (2d Cir. 1962), when Congress amended the Immigration and Nationality Act to preclude its application to crewmen, it did not enact a savings clause to protect pending administrative proceedings as it had done when that Act was adopted. We have examined the cases cited by counsel and find that they either came within the savings clause of the 1952 Act or are not pertinent to the issue herein.

Counsel complains that he was entitled to a hearing before the special inquiry officer to determine eligibility for suspension of deportation. The regulations, 8 CFR 103.5 do not provide for a hearing on a motion but merely require that the motion set up the new facts to be proved at the reopened hearing which shall be supported by affidavits or other evidentiary material and may be accompanied by a supporting brief. It would be obviously futile for the special inquiry officer to grant a hearing where the motion itself discloses ineligibility for the relief requested. The motion was properly denied.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.